

**In The
Supreme Court of the United States**

SOUTH BAY UNITED PENTECOSTAL CHURCH, AND
BISHOP ARTHUR HODGES III,

Applicants,

v.

GAVIN NEWSOM, in his official capacity as the Governor of California; XAVIER
BECERRA, in his official capacity as the Attorney General of California, SONIA
ANGELL, in her official capacity as California Public Health Officer, WILMA J.
WOOTEN, in her official capacity as Public Health Officer, County of San Diego,
HELEN ROBBINS-MEYER, in her official capacity as Director of Emergency Services,
County of San Diego, and WILLIAM D. GORE, in his official capacity as Sheriff,
County of San Diego

Respondents.

To the Honorable Elena Kagan, Associate
Justice of the United States Supreme Court and
Circuit Justice for the Ninth Circuit

**Supplemental Brief in Support of
Emergency Application for Writ of Injunction
Relief Requested by Sunday, May 31, 2020**

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and Bishop Arthur Hodges III*

**TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE
SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:**

This supplemental brief is written with respect to the above-entitled emergency application that was submitted on Saturday, May 23, 2020. The application concerns California’s restrictions placed on worship activities during the COVID-19 pandemic.

On May 22, 2020, President Trump announced that all states must immediately lift their restrictions on places of worship. Then, on May 25, 2020, Governor Newsom issued safety guidelines concerning how and when places of worship may reopen in California. These guidelines were not issued along with an executive order, press release, or press conference. Because these new guidelines were issued yesterday (Memorial Day), they were not included in the record below, and they are therefore attached to this brief. Exhibit A is a copy of the new safety guidelines. Exhibit B is the relevant portions of the modified “Stay Home Q&A” page from the Governor’s pandemic website.

Plaintiffs submit this supplemental brief to apprise Your Honor of this development and briefly explain its impact on Plaintiffs’ emergency application. As stated therein, Plaintiffs seek an injunction from this Court by **Sunday May 31, 2020—the Christian holy day of Pentecost**. *See* App., at 5.

First, the Guidelines merely set a ceiling above which no county may go. Thus, in all of California, “[p]laces of worship must [] limit attendance to 25% of building capacity or a maximum of 100 attendees, whichever is lower.” Ex. A, at 3. The Guidelines are also not immediately effective, but require individual counties to issue

an order adopting them, or setting stricter standards. Ex. A, at 3; Ex. B, at 4–5. As of the time of this writing, the County of San Diego has not confirmed whether it intends to issue any such order.

Second, Plaintiffs’ sanctuary seats 600 persons, and each service normally brings in between 200 and 300 congregants. 2ER308. Some of the larger houses of worship in California can seat 1,000 congregants or more. But under California’s Guidelines, Plaintiffs will only be permitted to welcome 100 congregants, with no explanation as to the justification for this arbitrary cap. In contrast, there is no percentage limitation for manufacturing and warehousing facilities—simply a social distancing requirement. 3ER570–84. A review of California’s sector-specific guidelines shows that the only two industries with percentage caps are retail and houses of worship,¹ and retail is set at a 50% cap.² Offices, manufacturing, food packaging, museums, and every other sector has no percentage cap.

As stated in Plaintiffs’ application, Plaintiffs seek an injunction permitting them to hold worship services this Pentecost Sunday (May 31, 2020), adhering to the *neutral* social distancing requirements that apply in the County of San Diego. *See* App. at 5; 3ER591, 598–605. Those requirements, which are good enough for every other industry, do not include a 25% or 100-person cap. Therefore, Plaintiffs still seek the injunction to prevent irreparable harm to their fundamental constitutional rights.

¹ <https://covid19.ca.gov/industry-guidance/>

² <https://covid19.ca.gov/pdf/guidance-auto-dealerships.pdf>; <https://covid19.ca.gov/pdf/guidance-retail.pdf>; <https://covid19.ca.gov/pdf/guidance-shopping-centers.pdf>.

Third, these new guidelines do not moot Plaintiffs' requested relief. "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)). And here, "the parties remain[] adverse; both retain[] the same stake in the litigation they had at the outset." *Id.* at 665. As demonstrated above, Plaintiffs have still not received equal treatment with every other similarly situated industry.

In addition, a "dispute remains live, if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Turner v. Rogers*, 564 U.S. 431, 439–40 (2011) (quotation marks and brackets omitted). Here, individual California counties may only permit worship services for intervals of 21 days. At the end of each period, the State will reevaluate their statistics and practices. Ex. A, at 3; Ex. B, at 3, 5. Thus, every three weeks Plaintiffs face the risk of having their constitutional rights again trampled upon. And, as stated in Plaintiffs' Application, there is a real possibility that California will re-issue unconstitutional orders restricting religious rights during later stages of the pandemic. *See App.*, at 4.

Fourth, the action by California has cast in stark relief the disparate treatment of California's churches, by moving Plaintiffs from full prohibition to 25% allowance (or 100-person cap). The State has not moved churches from "Stage 3" of its Reopening Plan to "Stage 2," but has created an entirely new regime to regulate them alone. But

there is a significant problem with the entire concept of a regime specifically regulating worship alone. And the Circuit Courts of Appeal have drastically split even on the issue of whether the types of executive orders at issue here must satisfy strict scrutiny.

- The Ninth Circuit ruled that California’s Reopening Plan was both neutral and generally applicable, and thus strict scrutiny was not triggered. But at the same time, the panel emphasized the importance of “temper[ing] doctrinaire logic with a little practical wisdom.” *South Bay United Pentecostal Church v. Newsom*, --- F.3d ---, No. 20-55533, Opn. at *3 (May 22, 2020).
- The Dissent from the Ninth Circuit found that California’s Reopening Plan was neither neutral nor generally applicable, and that strict scrutiny could not be satisfied. Under the Dissent’s logic, the new Guidelines would also not be neutral or generally applicable because they single out places of worship by name. *South Bay United Pentecostal Church v. Newsom*, --- F.3d ---, No. 20-55533, Dis. at *11–14 (May 22, 2020). This is also the position of the Department of Justice and all four of California’s U.S. Attorneys, as described in their letter to Governor Newsom. 9th Cir. Dkt. 14 at 21–23.
- The Seventh Circuit agreed with the Ninth Circuit in ruling that a similar executive order was both neutral and generally applicable, and thus strict scrutiny was not triggered. *Elim Romanian Pentecostal Church v. Pritzker*, --- F.3d ---, 2020 WL 2517093, at *1 (7th Cir. May 16, 2020).

- The Sixth Circuit agreed in part with the Ninth Circuit Dissent, ruling that a similar executive order was neutral, but not generally applicable, thus triggering strict scrutiny. However, by describing the order as neutral, the Sixth Circuit split from the Ninth Circuit Dissent and the Department of Justice. *Roberts v. Neace*, --- F.3d ---, 2020 WL 2316679, at *3 (6th Cir. May 9, 2020).
- The Fifth Circuit appears to agree with the Sixth Circuit, and not the Ninth Circuit Dissent—but this is not entirely clear. The Fifth Circuit enjoined a similar executive order without explanation, merely stating that the church must abide by “the Governor’s new ‘Safe Worship Guidelines for In-Person Worship Services,’ which appear similarly rigorous to the City’s requirements for reopening businesses.” *First Pentecostal Church of Holly Springs v. City of Holly Springs, Mississippi*, --- Fed.Appx. ---, 2020 WL 2616687, at *1 (5th Cir. May 22, 2020) (brackets omitted).

Thus, there remains widespread confusion among the district courts and intermediate appellate courts about what exactly is required under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). This confusion is leading to the erosion of fundamental constitutional rights. Moreover, it is causing—and will continue to cause—states to apply inconsistent constitutional standards as the pandemic evolves.

In light of these continued exigencies, it is imperative that states receive consistent and uniform guidance on this matter of utmost importance from Your

Honor or the entire Court. The deepening conflict between and among the various Circuit Courts of Appeal has triggered serious uncertainty as to what legal standard applies when citizens consider whether and under what circumstances they may freely exercise their religious faith by attending services at their church, temple, mosque or other place of worship.

A fundamental question that goes to the very heart of our constitutional legal order is whether and to what extent state and local officials may lawfully enforce categorical restrictions on public worship while honoring the First Amendment's strictures and guarantees that citizens may freely exercise their religious faith. For example, may they set fixed limits on numbers of worship participants— notwithstanding the church's observation of all prescribed contagion protective measures, when no comparable let alone equal limitations are imposed on other activities, such as manufacturing, retail merchandising, or marijuana or liquor dispensaries? At present, different answers must be given to those questions in the states within the Ninth and Seventh Circuits, on the one hand, and in the Sixth and Fifth Circuits, on the other hand—unless and until this Court establishes a clear and uniform national standard.

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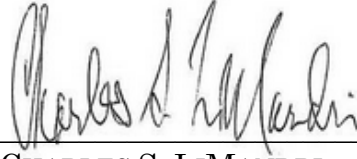
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Respectfully submitted,



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EXHIBIT A

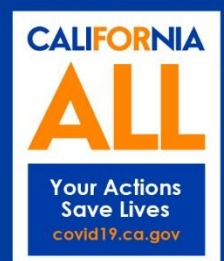


COVID-19 INDUSTRY GUIDANCE:

Places of Worship and Providers of Religious Services and Cultural Ceremonies

May 25, 2020

covid19.ca.gov



OVERVIEW

On March 19, 2020, the State Public Health Officer and Director of the California Department of Public Health issued an order requiring most Californians to stay at home to disrupt the spread of COVID-19 among the population.

The impact of COVID-19 on the health of Californians is not yet fully known. Reported illness ranges from very mild (some people have no symptoms) to severe illness that may result in death. Certain groups, including people aged 65 or older and those with serious underlying medical conditions, such as heart or lung disease or diabetes, are at higher risk of hospitalization and serious complications. Transmission is most likely when people are in close contact with an infected person, even if that person does not have any symptoms or has not yet developed symptoms.

Precise information about the number and rates of COVID-19 by industry or occupational groups, including among critical infrastructure workers, is not available at this time. There have been multiple outbreaks in a range of workplaces, indicating that workers are at risk of acquiring or transmitting COVID-19 infection. Examples of these workplaces include places of worship, long-term care facilities, prisons, food production, warehouses, meat processing plants, and grocery stores.

As stay-at-home orders are modified, it is essential that all possible steps be taken to ensure the safety of workers and the public.

Key prevention practices include:

- ✓ physical distancing to the maximum extent possible,
- ✓ use of face coverings by employees and volunteers (where respiratory protection is not required) and congregants/visitors,
- ✓ frequent handwashing and regular cleaning and disinfection,
- ✓ training employees and volunteers on these and other elements of the COVID-19 prevention plan.

In addition, it will be critical to have in place appropriate processes to identify new cases of illness in workplaces and, when they are identified, to intervene quickly and work with public health authorities to halt the spread of the virus.

PURPOSE

This document provides guidance for places of worship and providers of religious services and cultural ceremonies (referred to collectively as “places of worship”) to support a safe, clean environment for employees, interns and trainees, volunteers, scholars, and all other types of workers (referred to collectively as “staff”) as well as congregants, worshippers, visitors, etc. (referred to collectively as “visitors” or “congregants”).

This guidance does not obligate places of worship to resume in-person activity. Further, it is strongly recommended that places of worship continue to facilitate remote services and other related activities for those who are vulnerable to COVID19 including older adults and those with co-morbidities.

Even with adherence to physical distancing, convening in a congregational setting of multiple different households to practice a personal faith carries a relatively higher risk for widespread transmission of the COVID-19 virus, and may result in increased rates of infection, hospitalization, and death, especially among more vulnerable populations. In particular, activities such as singing and group recitation negate the risk-reduction achieved through six feet of physical distancing.

*Places of worship must therefore limit attendance to 25% of building capacity or a maximum of 100 attendees, whichever is lower. This limitation will be in effect for the first 21-days of a county public health department's approval of religious services and cultural ceremonies activities at places of worship within their jurisdictions.

Upon 21-days, the California Department of Public Health, in consultation with county Departments of Public Health, will review and assess the impact of these imposed limits on public health and provide further direction as part of a phased-in restoration of activities in places of worship.

NOTE: This guidance is not intended for food preparation and service, delivery of items to those in need, childcare and daycare services, school and educational activities, in-home caregiving, counseling, office work, and other activities that places and organizations of worship may provide. Organizations that perform these activities must follow applicable guidance on the [COVID-19 Resilience Roadmap website](#).

The guidance is not intended to revoke or repeal any employee rights, either statutory, regulatory or collectively bargained, and is not exhaustive, as it does not include county health orders, nor is it a substitute for any existing safety and health-related regulatory requirements such as those of Cal/OSHA.¹ Stay current on changes to public health guidance and state/local orders, as the COVID-19 situation continues. Cal/OSHA has more safety and health guidance on their Cal/OSHA Guidance on Requirements to Protect Workers from Coronavirus [webpage](#). The CDC has additional guidance [for community- and faith-based organizations](#).



Workplace Specific Plan

- Establish a written, workplace-specific COVID-19 prevention plan at every location, perform a comprehensive risk assessment of all work areas, and designate a person at each workplace to implement the plan.
- Identify contact information for the local health department where the workplace is located for communicating information about COVID-19 outbreaks among staff and congregants/visitors.
- Train and communicate with staff and employee representatives on the plan.
- Regularly evaluate workplaces for compliance with the plan and document and correct deficiencies identified.
- Investigate any COVID-19 illness and determine if any work-related factors could have contributed to risk of infection. Update the plan as needed to prevent further cases.
- Identify close contacts (within six feet for 15 minutes or more) of an infected staff member and take steps to isolate COVID-19 positive staff and close contacts.
- Adhere to the guidelines below. Failure to do so could result in workplace illnesses that may cause operations to be temporarily closed or limited.



Topics for Employee and Volunteer Training

- Information on [COVID-19](#), how to prevent it from spreading, and which underlying health conditions may make individuals more susceptible to contracting the virus.
- Self-screening at home, including temperature and/or symptom checks using [CDC guidelines](#).
- The importance of not coming to work or participating in activities if staff have symptoms of COVID-19 as [described by the CDC](#), such as a frequent cough, fever, difficulty breathing, chills, muscle pain, sore throat, recent loss of taste or smell, or if they or someone they live with have been diagnosed with COVID-19.

- To seek medical attention if their symptoms become severe, including persistent pain or pressure in the chest, confusion, or bluish lips or face. Updates and further details are available on [CDC's webpage](#).
- The importance of frequent handwashing with soap and water, including scrubbing with soap for 20 seconds (or using hand sanitizer with at least 60% ethanol or 70% isopropanol when staff cannot get to a sink or handwashing station, per [CDC guidelines](#)).
- The importance of physical distancing, both at work and off work time (see Physical Distancing section below).
- Proper use of face coverings, including:
 - Face coverings do not protect the wearer and are not personal protective equipment (PPE).
 - Face coverings can help protect people near the wearer, but do not replace the need for physical distancing and frequent handwashing.
 - Face coverings must cover the nose and mouth.
 - Employees should wash or sanitize hands before and after using or adjusting face coverings.
 - Avoid touching the eyes, nose, and mouth.
 - Face coverings should be washed after each shift.
- Ensure all types of staff including temporary, contract, and volunteer workers are also properly trained in COVID-19 prevention policies and have necessary PPE. Discuss these responsibilities ahead of time with organizations supplying temporary, contract, and/or volunteer staff.
- Information on employer or government-sponsored leave benefits the employee may be entitled to receive that would make it financially easier to stay at home. See additional information on [government programs supporting sick leave and worker's compensation for COVID-19](#), including employee's sick leave rights under the [Families First Coronavirus Response Act](#) and employee's rights to workers' compensation benefits and presumption of the work-relatedness of COVID-19 pursuant to the Governor's [Executive Order N-62-20](#).



Individual Control Measures and Screening

- Provide temperature and/or symptom screenings for all staff at the beginning of their shift. Make sure the temperature/symptom screener avoids close contact with staff to the extent possible. Both screeners and staff should wear face coverings for the screening.
- If requiring self-screening at home, which is an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker and/or volunteer leaving the home for their shift and follows [CDC guidelines](#), as described in the Topics for Employee Training section above.
- Encourage staff and congregants/visitors who are sick or exhibiting symptoms of COVID-19, or who have family members who are ill, to stay home.
- Employers should provide and ensure workers and volunteers use all required protective equipment, including eye protection and gloves, where necessary.
- Places of worship should consider where disposable gloves use may be helpful to supplement frequent handwashing or use of hand sanitizer; examples are for staff who are screening others for symptoms or handling commonly touched items. All workers and volunteers should wear gloves when handling items contaminated by body fluids.
- Face coverings are strongly recommended when staff are in the vicinity of others. Workers and volunteers should have face coverings available and wear them when at all facilities, in offices, when making home visits as part of providing services, or in a vehicle during work-related travel with others. Face coverings must not be shared. Places of worship are generally encouraged to provide face coverings but must provide them when required by employer rules or these guidelines.
- Staff, volunteers, etc. should not enter the home or visit someone who as tested positive for, exhibited symptoms of, or has been in contact with someone infected with COVID-19 for an appropriate waiting period as [described by CDC guidelines](#).
- Places of worship must take reasonable measures, including posting signage in strategic and highly-visible locations, to remind congregants/visitors that they should use face coverings and practice physical distancing whenever possible. Babies and children under age two should not wear face coverings, in accordance with [CDC guidelines](#).

- Use social media, website, texts, email, newsletters, etc., to communicate the steps being taken to protect congregants/visitors and staff so that they are familiar with the policies (including to stay home if experiencing symptoms or are at increased risk of becoming sick, face coverings, physical distancing, handwashing and/or sanitizing, and cough etiquette), before arriving at the facility. Staff and volunteers are strongly encouraged to remind congregants/visitors of these practices with announcements during services or on welcoming guests.
- Congregants/visitors should be screened for temperature and/or symptoms upon arrival to places of worship and asked to use hand sanitizer and to wear face coverings.



Cleaning and Disinfecting Protocols

- Perform thorough cleaning of high traffic areas such as lobbies, halls, chapels, meeting rooms, offices, libraries, and study areas and areas of ingress and egress including stairways, stairwells, handrails, and elevator controls. Frequently disinfect commonly used surfaces including doorknobs, toilets, handwashing facilities, pulpits and podiums, donation boxes or plates, altars, and pews and seating areas.
- Establish frequent cleaning and disinfection of personal work areas such as desks and cubicles and supply the necessary cleaning products. Provide time for workers to implement cleaning practices during their shift. Cleaning assignments should be assigned during working hours as part of the staff's job duties.
- Discourage sharing items used in worship and services (such as prayer books, cushions, prayer rugs, etc.) whenever possible and provide single-use or digital copies or ask congregants/visitors to bring personal items instead. Avoid sharing work equipment and supplies, such as phones, office equipment, computers, etc., wherever possible. Never share PPE.
- Where such items must be shared, disinfect between shifts or uses, whichever is more frequent, including the following: shared office equipment (copiers, fax machines, printers, telephones, keyboards, staplers, etc.) and items in shared worship items, etc., with a cleaner appropriate for the surface.
- Ensure that sanitary facilities stay operational and stocked at all times and provide additional soap, paper towels, and hand sanitizer when needed. Consider more frequently cleaning and disinfecting handwashing facilities that are used more often. Use signage to reinforce handwashing.

- Disinfect microphones and stands, music stands, instruments and other items on pulpits and podiums between each use. Consult equipment manufacturers to determine appropriate disinfection steps, particularly for soft, porous surfaces such as foam mufflers.
- Consider using disposable seat covers for congregants/visitors, particularly on porous surfaces or where a facility has multiple daily services. Discard and replace seat covers between each use. Provide disposable or washable covers on pillows used as seating on floors and change/wash them after each use.
- Install hand sanitizer dispensers, touchless whenever possible, at entrances and contact areas such as meeting rooms, lobbies, and elevator landings.
- When choosing cleaning chemicals, establishments should use products approved for use against COVID-19 on the [Environmental Protection Agency \(EPA\)-approved](#) list and follow product instructions. Use disinfectants labeled to be effective against emerging viral pathogens, diluted household bleach solutions (5 tablespoons per gallon of water), or alcohol solutions with at least 70% alcohol that are appropriate for the surface. Provide staff training on manufacturer's directions and Cal/OSHA requirements for safe use. Workers and volunteers using cleaners or disinfectants should wear gloves or other protective equipment as required by the product instructions.
- Wash religious garments and linens after each service or event, at the highest water setting possible. Ask congregants/visitors to bring their own storage bags for personal garments and shoes. Staff, congregants, and visitors should wear gloves when handling others' dirty linens, shoes, etc.
- Discontinue passing offering plates and similar items that move between people. Use alternative giving options such as secure drop boxes that do not require opening/closing and can be cleaned and disinfected. Consider implementing digital systems that allow congregants/visitors to make touch-free offerings.
- Mark walking paths between spaces designated for congregants/visitors to sit/kneel so that people do not walk where someone may touch their head to the floor.
- During meetings and services, introduce fresh outside air, for example by opening doors/windows (weather permitting) and operating ventilation systems.
- Consider installing portable high-efficiency air cleaners, upgrading the building's air filters to the highest efficiency possible, and making other

modifications to increase the quantity of outside air and ventilation in worship areas, offices, and other spaces.



Physical Distancing Guidelines

- Places of worship should continue to provide services through alternative methods (such as via internet live and/or recorded streaming, telephone, drive-in, etc.) whenever possible.
- Consider holding in-person meetings and providing in-person services outside whenever possible.
- Implement measures to ensure physical distancing of at least six feet between workers, staff, congregants/visitors, etc. This can include use of physical partitions or visual cues (e.g., floor or pew markings or signs to indicate where people should sit and stand). Reconfigure seating and standing areas to maintain physical distancing of six feet or more between congregants/visitors from different households. Consider limiting seating to alternate rows. Members of the same household may be seated together but should maintain at least six feet of distance from other households.
- Consider dedicating staff to help people maintain distances during activities.
- Shorten services to limit the length of time congregants/visitors spend at facilities whenever possible. This could include limiting speeches, asking congregants/visitors to put on garments at home before arrival, etc.
- Close places of worship for visitation outside of scheduled services, meetings, etc., whenever possible.
- Consider implementing a reservation system to limit the number of congregants/visitors attending facilities at a time. This can include the use of digital platforms or other types of tools.
- Encourage congregants/visitors to meet with the same group, particularly when services meet frequently and/or require a certain number of people to be present. This can reduce the spread of transmission by minimizing the number of different individuals who come into close contact with each other.
- Consider offering additional meeting times (per day or per week) so that fewer guests attend meetings and services at one time. Clean meeting areas between each use as described in this guidance.

- Discontinue large gatherings that encourage congregants/visitors to travel and break physical distances during activities, such as concerts, large holiday and life event celebrations and remembrances.
- Children should remain in the care of those in their household unit and not interact with children of other parties at any time while visiting facilities. Close play areas and discontinue activities and services for children where physical distancing of at least six feet cannot be maintained.
- Encourage congregants/visitors to physically distance themselves from others outside their household, avoid touching surfaces, and to leave the facility if they do not feel well.
- Consider limiting touching for religious and/or cultural purposes, such as holding hands, to members of the same household.
- Dedicate staff to direct guests to meeting rooms upon entry to places of worship rather than congregating in lobbies or common areas. Consider using ushers to help people find places to sit and stand that are at least six feet apart from other guests/household groups. Ask congregants/visitors to arrive and leave in a single group to minimize crossflow of people. Welcome and dismiss congregants/visitors from altars, podiums, meeting rooms, etc. in an orderly way to maintain physical distancing and minimize crossflow of traffic, to the extent possible.
- Prop or hold doors open during peak periods when congregants/visitors are entering and exiting facilities, if possible and in accordance with security and safety protocols.
- Close or restrict common areas, such as break rooms, kitchenettes, foyers, etc. where people are likely to congregate and interact. Consider installing barriers or increase physical distance between tables/seating when there is continued use of these areas.
- Turn off public drinking water fountains and place signs informing congregants/visitors they are inoperable.
- Remove from service or find low-community touch alternatives for communal/religious water containers such as fonts, sinks, and vessels. Empty and change water between uses. Where there is a possibility of contaminant splash, staff, congregants, visitors, etc., are strongly encouraged to use equipment to protect the eyes, nose, and mouth using a combination of face coverings, protective glasses, and/or face shields. Reusable protective equipment such as shields and glasses should be properly disinfected between uses.
- When washing is a required activity, modify practices whenever possible to limit splashing and the need to clean and disinfect washing facilities.

Encourage necessary washing to be performed at home prior to entering a facility, if possible.

- Reconfigure podiums and speaker areas, office spaces, meeting rooms, conference rooms, etc., to allow for at least six feet between people. Face coverings are strongly recommended at all times for congregants/visitors and staff, especially when physical distance of at least six feet is not possible.
- Establish directional hallways and passageways for foot traffic, if possible, and designate separate routes for entry and exit into meeting rooms, offices, etc., to help maintain physical distancing and lessen the instances of people closely passing each other.
- Limit the number of individuals riding in an elevator and ensure the use of face coverings. Post signage regarding these policies.
- Utilize practices, when feasible and necessary, to limit the number of staff and congregants/visitors in office, meeting spaces, etc., at one time. This may include scheduling (e.g. staggering start/end times), establishing alternating days for onsite reporting, returning to places of worship in phases, or continued use of telework when feasible.
- Consider offering workers and volunteers who request modified duties options that minimize their contact with congregants/visitors and other staff (e.g., office duties rather than working as an usher or managing administrative needs through telework).
- Stagger staff breaks, in compliance with wage and hour regulations, to maintain physical distancing protocols.
- Discontinue nonessential travel and encourage distance meetings via phone and internet.
- Close self-service item selection such as pamphlet displays and bookshelves and provide these items to congregants/visitors individually as necessary. Consider delivering items and information electronically.
- Consider limiting the number of people that use the restroom at one time to allow for physical distancing.
- Discourage staff, congregants, visitors, etc., from engaging in handshakes, hugs, and similar greetings that break physical distance. Take reasonable measures to remind people to wave or use other greetings.
- Reconfigure parking lots to limit congregation points and ensure proper separation (e.g., closing every other space). If performing drive-in

services, ensure vehicle windows and doors are closed if six feet of distance is not possible between vehicles.

- Continue to support non-in person attendance of services and other related activities by those who are vulnerable to COVID19 including older adults and those with co-morbidities.



Considerations for Places of Worship

- Discontinue offering self-service food and beverages. Do not hold potlucks or similar family-style eating and drinking events that increase the risk of cross contamination. If food and beverages must be served, provide items in single-serve, disposable containers whenever possible. Employees or volunteers serving food should wash hands frequently and wear disposable gloves and face coverings.
- Strongly consider discontinuing singing, group recitation, and other practices and performances where there is increased likelihood for transmission from contaminated exhaled droplets. Modify practices such as limiting the number people reciting or singing, ensuring physical distancing greater than six feet between people, or opt to celebrate these practices outside with physical distancing, etc., if these practices cannot be discontinued.
- Consider modifying practices that are specific to particular faith traditions that might encourage the spread of COVID-19. Examples are discontinuing kissing of ritual objects, allowing rites to be performed by fewer people, avoiding the use of a common cup, offering communion in the hand instead of on the tongue, providing pre-packed communion items on chairs prior to service, etc., in accordance with [CDC guidelines](#).



Considerations for Funerals

- Consider reduced visitor capacity and stagger visitation times at funerals, wakes, etc., if possible. Follow all cleaning and disinfection measures as described in this guidance. Whenever possible, remind visitors to maintain physical distance from each other, from staff and volunteers, and from the deceased.
- Consider modifying religious or cultural practices when washing or shrouding bodies of those who have died from COVID-19, in accordance with guidance from [CDPH](#) and the [CDC](#). If washing the body or shrouding are important religious or cultural practices, work with funeral home staff and families to reduce exposure as much as possible. All people

participating in these activities must wear disposable gloves and if there will be splashing of fluids, people must use additional protective equipment including protection for the eyes, nose, and mouth, such as face shields.

- Consult and comply with local guidance regarding limits on gathering sizes, travel, holding funerals for those who died from COVID-19, etc.
- Consider other recommendations and modifications of services related to places of worship outlined above, as applicable for funeral services.

¹Additional requirements must be considered for vulnerable populations. Places of worship must comply with all [Cal/OSHA](#) standards and be prepared to adhere to its guidance as well as guidance from the [Centers for Disease Control and Prevention \(CDC\)](#) and the [California Department of Public Health \(CDPH\)](#). Additionally, places of worship must be prepared to alter their operations as those guidelines change.



EXHIBIT B



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Stay home Q&A

Last updated May 25, 2020 at 11:46 AM

Menu



All individuals living in the State of California are currently ordered to stay home or at their place of residence, except for [permitted work](#), local shopping or other permitted errands, or as otherwise authorized (including in the Questions & Answers below).

On March 19, 2020, an [Executive Order \(PDF\)](#) and [Public Health Order \(PDF\)](#) directed all Californians to stay home except to go to an essential job or to shop for essential needs.

On May 4, 2020, an [Executive Order \(PDF\)](#) informed local health jurisdictions and industry sectors that they may gradually reopen under new modifications and guidance provided by the state per the May 7, 2020 [Public Health Order \(PDF\)](#).

See [essential jobs](#) and [open sectors](#)

Questions and answers

What is the relationship between the order and these questions and answers?

The Governor has ordered Californians to obey the directives of the State Public Health Officer. Those directives take many forms; they include specific materials linked on this page, as well as these questions and answers. These questions and answers are directives from the State Public Health Officer, and have the same force and effect as other State Public Health Officer directives.

When does the stay home order go into effect and how long will we stay home? What areas of the state are covered?

The order went into effect on Thursday, March 19, 2020. The order is in place until further notice. It covers the whole state of California.

As of May 8, the stay home order was modified. We are now in the first phase of **Stage 2**. This means in addition to essential activity, retail is allowed, along with the infrastructure to support it. As of May 12, offices, limited services, and outdoor museums are also permitted to open.

Six key health and scientific [indicators](#) will be considered before modifying the state's stay home order to allow additional Stage 2 activity.

What's open?



What's closed?



Is it safe to shop at these businesses?



Can the Order be changed?



Yes. The State Public Health Officer may issue new orders as the public health situation changes.

How does this order interact with local orders to shelter in place? Does it supersede them?



If I am not an Essential Critical Infrastructure Worker, can I still leave the house?



[Protected activities](#)

Protected activities

Can I engage in political protest?



Yes, as explained below, although in-person protests present special public health concerns.

Even with adherence to physical distancing, bringing members of different households together to engage in in-person protest carries a higher risk of widespread transmission of COVID-19. Such gatherings may result in increased rates of infection, hospitalization, and death, especially among more vulnerable populations. In particular, activities like chanting, shouting, singing, and group recitation negate the risk-reduction achieved through six feet of physical distancing. For this reason, people engaging in these activities should wear face coverings at all times.

Therefore, it is strongly recommended that those exercising their right to engage in political expression (including, for example, their right to petition the government) should utilize alternative channels, such as the many online and broadcasting platforms available in the digital age, in place of in-person gatherings.

However, state public health directives do not prohibit in-person protests as long as (1) attendance is limited to 25% of the relevant area's maximum occupancy, as defined by the relevant local permitting authority or other relevant authority, or a maximum of 100 attendees, whichever is lower, and (2) physical distancing of six feet between persons or groups of persons from different households is maintained at all times. Failure to maintain adequate physical distancing may result in an order to disperse or other enforcement action. Face coverings are strongly recommended.

Participants must maintain a physical distance of six feet from any uniformed peace officers and other public safety personnel present, unless otherwise directed, and follow all other requirements and directives imposed by local health officers and law enforcement, or other applicable authorities.

This limitation on attendance will be reviewed at least once every 21 days, beginning May 25, 2020. This review will assess the impacts of these imposed limits on public health and provide further direction as part of a phased-in restoration of gatherings that implicate the First Amendment.

How do I vote?



Can I practice my religious faith?



Yes. Practicing your faith is a constitutionally-protected activity and may manifest in many different forms.

Although in-person religious gatherings—like other in-person gatherings—have been restricted to prevent the transmission of COVID-19, on May 25, 2020, the State Public Health Officer began to ease restrictions on in-person religious gatherings. In particular, the State Public Health Officer now authorizes County Departments of Public Health to allow collective activities at places of worship, subject to conditions to support a safe, clean environment for employees, interns and trainees, volunteers, scholars, and all other types of workers as well as congregants, worshippers, and visitors.

What conditions must be met to resume religious services at places of worship?



Full information on conditions imposed by the state can be found at [guidance for places of worship](#). Additionally conditions may be imposed by local public health officials. This guidance does not obligate places of worship to resume in-person activity and it is strongly recommended that places of worship continue to facilitate remote services and other alternatives to in-person religious practice for those who are vulnerable to COVID19.

Even with adherence to physical distancing, convening in a congregational setting of multiple different households to practice a personal faith carries a higher risk of widespread transmission of COVID-19, and may result in increased rates of infection, hospitalization, and death, especially among more vulnerable populations. In particular, activities like singing and group recitation dramatically increase the risk of COVID-19 transmission. For this reason,

congregants engaging in singing, particularly in the choir, and group recitation should wear face coverings at all times.

Places of worship must therefore limit attendance to 25% of building capacity or a maximum of 100 attendees, whichever is lower. This limitation will be in effect for the first 21-days of a county public health department's approval of religious services and cultural ceremonies activities at places of worship within their jurisdictions.

Can children attend group activities (like Sunday school or Hebrew school) at places of worship?

At this time, no. Children should remain in the care of those in their household unit and not interact with children of other parties at all times while visiting facilities. Additionally, places of worship must discontinue activities and services for children (including, for example, shared play areas) where physical distancing of at least six feet cannot be maintained.

When will these conditions change for places of worship?

Every 21 days, the California Department of Public Health, in consultation with county Departments of Public Health, will review and assess the impacts of these imposed limits on public health and provide further direction as part of a phased-in restoration of activities in places of worship. This is because COVID-19 has an incubation period of 14 days; the 21-day interval accounts for this incubation period and provides for an additional seven days for thorough review, analysis, and preparation of modifications.

In the Supreme Court of the United States

SOUTH BAY UNITED PENTECOSTAL CHURCH, ET. AL.,
Applicants,

v.

GAVIN NEWSOM, ET AL.,
Respondents.

**OPPOSITION OF STATE RESPONDENTS TO
EMERGENCY APPLICATION FOR WRIT OF INJUNCTION**

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STATEMENT

1. The novel coronavirus disease (COVID-19) has infected nearly 1.7 million people in the United States.¹ To date, over 100,000 Americans have died.² There is not yet a cure or a vaccine, and likely will not be for many months.³ In response to this pandemic, governments, private organizations, and individuals have taken unprecedented steps to protect their communities. The country has witnessed “a rapid reorientation of workplace practices and social life in support of public health.” *Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 135 (2d Cir. 2020).

While there remain many areas of uncertainty about this new disease and the virus that causes it, medical and public-health experts now have a basic understanding of who is most vulnerable to severe infection and how the virus spreads. People over 65 years of age and individuals with chronic health conditions, such as diabetes or heart disease, are most likely to develop severe symptoms.⁴ In such cases, the virus causes parts of the lungs to collapse or fill with fluid, thereby inhibiting breathing and preventing sufficient oxygen from

¹ Centers for Disease Control & Prevention, Coronavirus Disease, *Cases in the U.S.*, <https://tinyurl.com/qqt3aq6> (last visited May 28, 2020).

² *Id.*

³ See, e.g., Ercolano, Johns Hopkins University Hub, *A Coronavirus Vaccine Is In The Works—But It Won’t Emerge Overnight*, April 16, 2020, <https://tinyurl.com/y8sypwke>.

⁴ California Department of Public Health, *Symptoms and Risks*, <https://tinyurl.com/y8snarry> (updated May 15, 2020).

reaching the bloodstream.⁵ Doctors are also finding that the virus can “push kidneys into failure, send the body’s immune system into catastrophic overdrive, and cause blood clots that impede circulation to the lungs, heart, or brain.”⁶ For patients who survive, medical experts believe it may take upwards of a year for the organ damage to heal.⁷

Coronavirus spreads easily. The virus “is thought to spread mainly from person to person . . . through respiratory droplets,” which often “land in the mouths or noses of people who are nearby.” E.R. 125 (Declaration of James Watt, M.D., M.P.H.).⁸ Vocal activity such as “loud speech” “can emit thousands of oral fluid droplets per second,” “confirm[ing] that there is a substantial probability that normal speaking causes airborne virus transmission in confined environments.”⁹ And the virus “can be transmitted by a person who is asymptomatic.” E.R. 125. Indeed, “[e]merging research suggests that people may actually be most likely to spread the virus to others during the 48 hours

⁵ Galiatsatos, Johns Hopkins Medicine, *What Coronavirus Does to the Lungs* (April 13, 2020), <https://tinyurl.com/ycfk6s57>.

⁶ Marks & Pour, *What We Still Don’t Know About the Coronavirus*, The New Yorker, April 29, 2020, <https://tinyurl.com/y7svnhrr>; see also Ledford, *How Does COVID-19 Kill? Uncertainty Is Hampering Doctors’ Ability To Choose Treatments*, Nature, April 9, 2020, <https://tinyurl.com/v8z9b6b>.

⁷ Galiatsatos, *supra*, *What Coronavirus Does to the Lungs*.

⁸ “E.R.” refers to the Excerpts of Record in the court of appeals.

⁹ Stadnytskyi et al., *The Airborne Lifetime of Small Speech Droplets and their Potential Importance in SARS-CoV-2 Transmission*, Proceedings of the National Academy of Sciences (May 4, 2020), <https://tinyurl.com/y8d6jmk8>.

before they start to experience symptoms.”¹⁰ That “makes it difficult to prevent spread,” E.R. 125, because people may engage in certain risky activities, such as attending events in close proximity to others, that they would avoid if they were experiencing symptoms.

2. In the absence of a vaccine or cure, many jurisdictions, including California, have adopted emergency measures to slow the virus’s spread. On March 4, 2020, California Governor Gavin Newsom declared a state of emergency and, not long afterward, issued executive orders directing most Californians to stay home and “to heed any orders and guidance” issued by the California Public Health Officer. Executive Order N-25-20 (March 12, 2020), <https://tinyurl.com/uuq893k>; see E.R. 156-157 (Executive Order N-33-20 (March 19, 2020) (stay-at-home order)). While exceptions to the stay-at-home order were made for certain activities like grocery shopping and some types of outdoor physical fitness, the State has urged people to respect physical-distancing protocols at all times, remaining at least six feet apart from those who are not from the same household.¹¹ The State has also advised people to wear masks or other face coverings in public, while cautioning that face

¹⁰ Harvard Health Publishing, Harvard Medical School, *Coronavirus Resource Center*, <https://tinyurl.com/wmdmeym> (last updated May 22, 2020).

¹¹ *California Stay Home Q&A*, <https://tinyurl.com/y7w4nqs8> (last visited May 28, 2020); see also, e.g., Thompson et al., *California Advises Against Even Small Social Gatherings*, Associated Press (March 12, 2020), <https://tinyurl.com/yahxkqqt>.

coverings should not substitute for other “strong defenses, such as physical distancing and frequent hand washing.”¹²

At the same time, California recognized the importance of balancing these extraordinary measures against the need to maintain “Californians’ health and well-being.” E.R. 156-157 (Executive Order N-33-20). The State’s health care directives thus provided exemptions for those working in “critical infrastructure sectors” as designated by the federal Department of Homeland Security and supplemented by the California Public Health Officer. *See id.* at 156; *id.* at 162 (Supplemental Guidance on Critical Infrastructure Workers).¹³ For example, because members of the community depend upon continued access to food and medicine, grocery stores and pharmacies were permitted to remain open—but only with safeguards in place to protect store workers and members of the community from undue risks of exposure. *See* E.R. 163-164, 167-168. Likewise, because many people rely on restaurants as a source of food, restaurants were allowed to continue operating, but were limited to providing take-out and delivery options. *See id.* at 167-168.¹⁴

¹² California Department of Public Health, *Face Coverings Guidance* (April 1, 2020), <https://tinyurl.com/smhvkua>.

¹³ *See also* Department of Homeland Security, *Critical Infrastructure Sectors*, <https://tinyurl.com/qlpwg6x>.

¹⁴ California Department of Public Health, *Coronavirus Disease (COVID-19) and Guidance on Retail Food, Beverage, and Other Related Service Venues* (March 16, 2020), <https://tinyurl.com/ycdltlhf>.

Religious organizations were also deemed essential in California. The State recognized that members of the clergy provide “support and faith-based services” critical to the spiritual needs of many Californians. E.R. 177. While the risk of viral spread from large in-person gatherings was too substantial to permit in-person religious services in the initial weeks of the crisis, California authorized clergy to travel to church facilities and offices to record, broadcast, or stream services that their congregations could view at home. *See id.* The State also allowed churches to host drive-in services, so long as attendees remained in their vehicles, sufficiently far apart from one another.¹⁵

3. As a result of its early steps to combat the spread of COVID-19, California has not seen infection or death rates climb as high as in other parts of the country. As of May 27, 2020, the State has reported about 99,000 cases and approximately 3,800 deaths, or about 250 cases and 10 deaths per 100,000 people (compared, for example, to about 1,900 cases and 150 deaths per 100,000 people in New York).¹⁶ Infections continue to increase, but the rate of new cases appears to have slowed.¹⁷

¹⁵ California Department of Public Health, *COVID-19 Industry Guidance: Places of Worship and Providers of Religious Services and Cultural Ceremonies* 9 (May 25, 2020), <https://tinyurl.com/y97vsvnv>.

¹⁶ *See* <https://covid19.ca.gov> (last visited May 27, 2020); *Coronavirus Map & Case Count: California*, N.Y. Times, <https://tinyurl.com/u6r2cf2> (last visited May 27, 2020); *Coronavirus Map & Case Count: New York*, N.Y. Times, <https://tinyurl.com/yczhbv4w> (last visited May 27, 2020).

¹⁷ *See Tracking Coronavirus in California*, L.A. Times,

In light of that progress, Governor Newsom and the California Public Health Officer announced on April 28, 2020 that California would begin to implement a reopening plan called the Pandemic Resilience Roadmap. *See Update on California’s Pandemic Roadmap*, <https://tinyurl.com/yaamk84m> (Roadmap).¹⁸ The plan calls for gradually moving through four stages: Stage One, the strict, initial response to the pandemic, including the stay-at-home order; Stage Two, reopening “lower risk sectors”; Stage Three, reopening certain “higher risk sectors”; and finally, Stage Four, at which point all restrictions will be lifted. Roadmap at 5. Public health officials classified workplaces as “lower risk” if they can safely reopen with adaptations to allow for physical distancing. For example, retail stores, manufacturing operations, and offices may reopen, but only with measures in place to limit “the number of [people] in enclosed areas,” where feasible, and additional measures to ensure “at least six feet of separation to limit transmission of the virus.”¹⁹ Stages Three and Four were reserved for workplaces, events, and other

<https://tinyurl.com/qu79hu7> (last visited May 28, 2020).

¹⁸ *See also* Governor Gavin Newsom, Press Release, *Governor Newsom Provides Update on California’s Progress Toward Stage 2 Reopening* (May 4, 2020), <https://tinyurl.com/y9ru2sam>.

¹⁹ California Department of Public Health, *COVID-19 Industry Guidance: Manufacturing* 7 (May 12, 2020), <https://tinyurl.com/y8owdgw3>; *see also* California Department of Public Health, *COVID-19 Industry Guidance: Office Workplaces* 6 (May 12, 2020), <https://tinyurl.com/y9xrdjws>; California Department of Public Health, Press Release, *Counties Statewide Can Reopen Places of Worship for Religious Services and Retail Stores* (May 25, 2020), <https://tinyurl.com/y7ke2ju4>.

settings in which people gather in close proximity for extended periods of time—for example, in-person religious services, movie theaters, and nail salons, Roadmap at 12 (Stage Three), as well as larger gatherings, such as concerts and athletic events with live audiences, *id.* (Stage Four).

Decisions to move from one stage to the next are based upon several risk-based indicators, including the rate of hospitalizations, available levels of testing, and progress in implementing “contact tracing,” which allows officials to identify and warn those who have been in close proximity to an infected individual. *See* Roadmap at 2.²⁰ On May 7, 2020, the California Public Health Officer announced that there had been sufficient progress on a statewide level to move to Stage Two. *See* Order of the California State Public Health Officer (May 7, 2020), <https://tinyurl.com/ybn45nux>. In doing so, she indicated that the State would continue to reevaluate the Roadmap in light of evolving conditions, “progressively designat[ing] sectors, businesses, establishments, or activities that may reopen.” *Id.* at 2.

4. South Bay United Pentecostal Church is a religious community located near San Diego, California. Bishop Arthur Hodges III is the Church’s senior presiding pastor. On May 11, 2020, the Church and Bishop Hodges sought a temporary restraining order, asking the U.S. District Court for the Southern District of California to order state and county officials to “mov[e]”

²⁰ *See also State Report Card: Criteria for Moving to Stage 2 on the Resilience Roadmap* (May 4, 2020), <https://tinyurl.com/ycgkec6g>.

in-person worship services “from Stage 3 of the Reopening Plan to Stage 2.” E.R. 280. According to plaintiffs, so long as they agreed to abide by certain physical-distancing measures, it would violate the Free Exercise Clause, Equal Protection Clause, and Due Process Clause to forbid the Church from hosting “[c]ommunal worship and ministry.” *Id.* Plaintiffs agreed that the State has a “compelling interest in curbing pandemics.” *Id.* at 279. But they argued that California had inadequately justified its decision to slate in-person worship services for reopening in Stage Three of the Roadmap, while permitting “manufacturing and retail” to reopen during Stage Two. *Id.* at 279-280.

The defendants opposed the requested restraining order, explaining that the State had consistently assigned “all large public gatherings, including religious services” to Stage Three. E.R. 87. In the view of state public-health officials, large public gatherings pose a heightened risk of spread because attendees are “stationary in close quarters for extended periods of time.” *Id.* Moreover, at religious services, “congregants are often speaking aloud and singing, which increases the danger that infected individuals will project respiratory droplets that contain the virus,” “thereby infect[ing] others.” *Id.*; *see supra* at 2. As James Watt, M.D., M.P.H., an epidemiologist with the California Department of Health, explained in a declaration submitted to the district court, there “have been multiple reports of sizable to large gatherings such as religious services, choir practices, funerals, and parties resulting in significant spread of COVID-19.” E.R. 127. Defendants pointed, for example,

to a worship service in Sacramento tied to 71 COVID-19 cases; a choir practice in Seattle linked to 32 cases; a Kentucky church revival tied to 28 cases; and a religious service in South Korea where over 5,000 cases were traced back to a single infected individual in attendance. *Id.* at 87-88 (collecting citations).

On May 15, 2020, the district court denied the requested restraining order, reasoning that the plaintiffs were unlikely to succeed on the merits and that the balance of equities weighed against relief because the “virus poses a serious health risk” and the “only way currently known to curb the disease is to limit personal exposure.” E.R. 32.

Plaintiffs appealed, moving for expedited briefing and an emergency injunction pending appeal. On May 22, 2020, the Ninth Circuit agreed to consider the appeal on an expedited basis but denied immediate injunctive relief. Appl. Ex. A at 2; C.A. Dkt. No. 28.²¹ The court concluded that plaintiffs had not demonstrated a likelihood of success on the merits because, “[w]here state action does not ‘infringe upon or restrict practices because of their religious motivation’ and does not ‘in a selective manner impose burdens only on conduct motivated by religious belief,’ it does not violate the First Amendment.” Appl. Ex. A at 3 (quoting *Church of the Lukumi Babalu Aye, Inc.*

²¹ The Ninth Circuit denied the defendants’ motion to dismiss the appeal for lack of jurisdiction. While acknowledging that the court generally lacks appellate jurisdiction to review the denial of a temporary restraining order, the court concluded that the denial here was “tantamount to the denial of a preliminary injunction” for purposes of 28 U.S.C. § 1292(a). Appl. Ex. A at 2 (internal quotation marks omitted).

v. City of Hialeah, 508 U.S. 520, 533, 543 (1993)). The court also stressed that “we’re dealing here with a highly contagious and often fatal disease for which there presently is no known cure.” *Id.* Judge Collins dissented, agreeing with plaintiffs that the State had failed to provide a sufficient justification for assigning in-person worship services to Stage Three of the reopening plan. Appl. Ex. A, Dissent at 15-16. Plaintiffs’ appeal remains pending; the opening brief is due on June 5, 2020. C.A. Dkt. No. 28.

5. On May 23, 2020, plaintiffs filed an emergency application for injunctive relief with Justice Kagan. Plaintiffs sought the ability to “resume worship services” by May 24, or “in the alternative,” “by Pentecost Sunday—May 31, 2020.” Appl. 5; *see id.* at 11-12. They explained that “this application is about California’s modifications to its Stay-At-Home order made by California Governor Newsom’s May 7, 2020, ‘Resilience Roadmap.’” *Id.* at 3. Plaintiffs argued that injunctive relief is appropriate because, following completion of the pending appeal before the Ninth Circuit, this Court is likely to grant certiorari on the question whether “California’s four stage Reopening Plan, which permits manufacturing, warehousing, retail, offices, seated dining at restaurants, and schools to reopen, but not places of worship, violate[s] the Free Exercise Clause.” Appl. i; *see id.* at 14-15. Plaintiffs noted, however, that the Governor had “announced that on Monday, May 25” the State would “release further expedited plans” for in-person religious services. *Id.* at 3.

6. In the statement referenced by plaintiffs, made on May 22, Governor Gavin Newsom had announced that the State was “working with the faith community . . . to put out guidelines, processes, and procedures,” allowing “churches [to] reopen[] in a safe and responsible manner.”²² The State issued those guidelines on May 25, 2020. The Department of Public Health concluded that places of worship could hold in-person services during Stage Two of the reopening so long as they adhered to certain restrictions, including “limit[ing] attendance to 25% of building capacity or a maximum of 100 attendees” and implementing “measures to ensure physical distancing.” California Department of Public Health, *COVID-19 Industry Guidance: Places of Worship and Providers of Religious Services and Cultural Ceremonies* 3, 9 (May 25, 2020), <https://tinyurl.com/y97vsvnv> (Guidance on In-Person Worship). This policy tracked recent guidance issued by the federal Centers for Disease Control and Prevention on in-person religious services, including the CDC’s recommendation for churches “to limit the size of gatherings in accordance with the guidance and directives of state and local authorities.” Centers for Disease Control & Prevention, *Interim Guidance for Communities of Faith* (May 22, 2020), <https://tinyurl.com/y7v7a342>.²³

²² Governor Gavin Newsom, Press Conference, Transcript (May 22, 2020), <https://tinyurl.com/y7sgqefm>.

²³ The State’s new guidance, including the 100-person or 25% capacity cap, applies to both in-person religious gatherings and political protests. But other large gatherings remain barred. See *California Stay Home Q&A: Are*

California’s new guidance cautioned that, even with distancing measures in place, “convening in a congregational setting of multiple different households” still “carries a relatively higher risk for widespread transmission of the COVID-19 virus, and may result in increased rates of infection, hospitalization, and death, especially among more vulnerable populations.” Guidance on In-Person Worship at 3. So, while the State allowed the new guidance to take effect immediately (subject to approval by county public-health departments), it committed to monitoring the issue closely over the coming 21 days to “review and assess the impact of [the new guidance] on public health.” *Id.* On May 26, 2020, the San Diego County Department of Public Health issued an order allowing churches within the county—including South Bay United Pentecostal—to hold in-person services pursuant to the guidance issued by the State.²⁴

7. On May 26, 2020, plaintiffs filed a supplemental brief with Justice Kagan asking the Court to issue “an injunction permitting them to hold worship services this Pentecost Sunday” without adhering to the newly issued guidance—in particular, the “25% or 100-person cap.” Supp. Br. 2. Plaintiffs

Gatherings Permitted?, <https://tinyurl.com/y7w4nqs8> (last visited May 28, 2020) (defining prohibited gatherings as “meetings or other events that bring together persons from multiple households at the same time for a shared or group experience in a single room, space, or place such as an auditorium, stadium, arena, large conference room, meeting hall, or other indoor or outdoor space”).

²⁴ County of San Diego, Order of the Health Officer & Emergency Regulations ¶ 14 (May 26, 2020), <https://tinyurl.com/uhnq3gb>.

argue that they will be injured absent injunctive relief because their “sanctuary seats 600 persons, and each service normally brings in between 200 and 300 congregants.” *Id.*

ARGUMENT

As plaintiffs acknowledge (Appl. 14), a request for injunctive relief from this Court in the first instance “demands a significantly higher justification’ than a request for a stay, because unlike a stay, an injunction ‘does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.’” *Respect Maine PAC v. McKee*, 562 U.S. 996 (2010). The “legal rights at issue” must be “indisputably clear.” *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers). Plaintiffs must also show that they are “likely to suffer irreparable harm in the absence of preliminary relief,” “that the balance of equities tips in [their] favor,” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), and that the Court is likely to grant certiorari and reverse after the completion of lower-court proceedings, Shapiro et. al., *Supreme Court Practice* § 17.13(b), p. 17-38 (11th ed. 2019). Plaintiffs fail to satisfy these standards because, among other things, California’s updated guidance allows them to do what their emergency application requests—“resume worship services.” Appl. 5.

I. BECAUSE IN-PERSON WORSHIP SERVICES ARE PERMITTED, PLAINTIFFS FAIL TO SHOW AN IRREPARABLE INJURY, LET ALONE ONE THAT OUTWEIGHS THE PUBLIC INTEREST IN COMBATTING A PANDEMIC

1. Plaintiffs cannot demonstrate “the basic requisite[] of the issuance of equitable relief”: “the likelihood of substantial and immediate irreparable injury.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983) (internal quotation marks omitted). Under California’s newly issued guidance, plaintiffs are no longer “[r]equir[ed] . . . to abstain from religious gatherings.” E.R. 516. They may now “resume in-person activity,” Guidance on In-Person Worship at 3—including on this coming Sunday, May 31, 2020, the Christian holy day of Pentecost, *see* Appl. 1. The harm that plaintiffs have alleged throughout this litigation has thus been redressed. *E.g.*, Appl. 30-31; E.R. 300, 516.

Although plaintiffs’ supplemental brief contends that they continue to face irreparable harm from the new guidance, they acknowledge that the guidance was “not included in the record below.” Supp. Br. 1-2. Because an order enjoining the new guidance was not “first sought in the appropriate court or courts below,” the Court should not entertain plaintiffs’ request to address the new guidance in the first instance. Sup. Ct. R. 23.3; *cf. Conforte v. C.I.R.*, 459 U.S. 1309, 1312 n.2 (1983) (Rehnquist, J., in chambers) (“Applicant’s failure to seek a stay in the Court of Appeals provides an alternative ground for denial of the stay.”).

In any event, plaintiffs fail to explain how they are injured by the new guidance. The Church typically holds three to five Sunday services, with each

“normally bring[ing] in between 200 and 300 congregants.” Supp. Br. 2; *see* Appl. 8. While the updated guidance limits attendance at each service to 100 persons or 25% of building capacity, plaintiffs point to nothing preventing them from “offering additional meeting times” if necessary to accommodate all congregants—just as the new guidance encourages and plaintiffs’ own expert has recommended. Guidance on In-Person Worship at 9; *see* E.R. 319. Indeed, plaintiffs might have to increase the number of services anyway to fulfill their stated intent of keeping every other row of seats empty and maintaining six feet of separation between family groups. E.R. 319-320; *see id.* at 294, 505. And in pledging to “encourage” congregants to “stay home” if they feel “uncomfortable with gathering during the pandemic,” plaintiffs have suggested that congregant attendance may be lower than normal. *Id.* at 505.

Plaintiffs also argue that the case is not moot. Supp. Br. 3. But whether or not that is so, plaintiffs are not excused from satisfying the requirements for injunctive relief, including the need to show that they are “likely to suffer irreparable harm in the absence of preliminary relief.” *Winter*, 555 U.S. at 20. “[N]o court can enjoin” conduct that has ceased and thus no longer threatens irreparable injury. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016); *see Lyons*, 461 U.S. at 101, 111-112; *cf. Tory v. Cochran*, 544 U.S. 734, 739 (2005) (Thomas, J., dissenting) (“[w]hether or not” a changed

circumstance “moots this case, it certainly renders the case an inappropriate vehicle for resolving the question presented”).²⁵

2. Even if plaintiffs could articulate an injury that is not redressed by the recent guidance, the “overall public interest” in enforcement of that guidance would “tip strongly in favor of” the State as it continues to work to protect the public health during this pandemic. *Winter*, 555 U.S. at 26. “Plaintiffs have never disputed that the government has a compelling interest in curbing the novel coronavirus.” Appl. 23. A “community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905). And the public interest in enforcement of the law is substantial when the government acts as “guardian of the public” during a crisis. *Yakus v. United States*, 321 U.S. 414, 441-442 (1944) (citing, e.g., *Jacobson*, 197 U.S. at 11); see *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment) (referring to extraordinary governmental power during “a social emergency rising to the level of imminent danger to life and limb”); cf. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (emphasizing “the historic primacy of state regulation of matters of health and safety”).

²⁵ If the case is subject to the “capable of repetition, yet evading review” exception, as plaintiffs suggest, Supp. Br. 3, the appropriate remedy would be to seek declaratory relief. See *Quern v. Mandley*, 436 U.S. 725, 733 n.7 (1978); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538 n.7 (1978). While plaintiffs may continue pressing a claim for declaratory relief in the ongoing lower-court proceedings, see E.R. 520; *supra* at 7-10, the only request now pending before this Court is an application for an injunction.

Here, the California Department of Public Health has concluded that places of worship must “limit attendance to 25% of building capacity or a maximum of 100 attendees” to diminish the serious risk of “widespread transmission of the COVID-19 virus” in a setting where many people gather indoors for an extended period of time. Guidance on In-Person Worship at 3; *see* E.R. 126-127 (Declaration of James Watt, M.D., M.P.H.). Consistent with the State’s risk-based approach to combatting the virus, *supra* at 7, 12, California will continue to “review and assess the impact” of this policy in the coming weeks, Guidance on In-Person Worship at 3. When the attendance restriction proves unnecessary, the State will lift it or loosen it. In light of the tremendous uncertainty continuing to surround this new and deadly virus, however, it would be rash to do so today, before public-health officials have had the opportunity to evaluate evidence of the policy’s effectiveness in practice.

II. THERE IS NO REASONABLE PROBABILITY THAT THE COURT WILL GRANT REVIEW AND REVERSE

Far from demonstrating that “the legal rights at issue are “indisputably clear,” *Lux*, 561 U.S. at 1307 (Roberts, C.J., in chambers), plaintiffs fail to show that it is likely that any court will conclude that the current policy, which allows them to hold in-person religious services subject to reasonable safety restrictions, violates their constitutional rights. For that reason, and because California’s new guidance makes this a poor vehicle for considering the constitutionality of broader restrictions on religious worship that may continue to exist in other States (Appl. 2), there is no “reasonable probability” that this

Court would grant certiorari and reverse following the completion of proceedings before the Ninth Circuit. Shapiro et. al., *Supreme Court Practice* § 17.13, p. 17-32 (11th ed. 2019).

1. Plaintiffs’ free exercise claim is unlikely to succeed. Whatever the merit of their prior contention that the State had failed to justify slating in-person religious services for “Stage Three” of the reopening plan, *supra* at 7-10, plaintiffs’ supplemental brief does not demonstrate that the revised guidance is unconstitutional. Indeed, while in-person religious services are now permitted, many other activities that are “most comparable” in terms of COVID-transmission risk factors—“concerts, lectures, theatrical performances, or choir practices, in which groups of people gather together for extended periods”—continue to be barred. *Elim Romanian Pentecostal Church v. Pritzker*, 2020 WL 2517093, at *1 (7th Cir. May 16, 2020); *see supra* at 11-12 & n.23. Plaintiffs are thus incorrect that the State has engaged in “unconstitutional religious targeting.” Appl. 19; *see id.* at 17-19 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)).²⁶ And while it is not at all clear that ordinary constitutional analysis would be

²⁶ Moreover, the exceptions from the stay-at-home order that plaintiffs refer to—for “retail, offices, manufacturing, and schools,” among others, Appl. 20-21—are entirely neutral towards religion: church-run retail and offices, manufacturers of religious items, sellers of sacramental wine, producers of religious movies, and religiously affiliated schools and counseling services are treated the same as their secular counterparts. *See, e.g., Statewide Industry Guidance to Reduce Risk: Office Workplaces & Limited Services*, <https://tinyurl.com/y8xtowt6> (last visited May 27, 2020).

appropriate in today's "emergency circumstances," Appl. 25, California's revised guidance is constitutional under any applicable standard of scrutiny.

California public-health officials have employed a variety of tools to combat the unprecedented threat of COVID-19. One is requiring physical distancing, ensuring that people remain at least six feet apart when it is necessary for them to be in one another's presence. *See e.g., supra* at 3-4, 6. Another is following the CDC's recommendation to limit overall group size so that fewer people have to be around one another in the first place.²⁷ For example, California has directed grocery stores and pharmacies to limit the total number of customers "at any given time as necessary to reduce outdoor/indoor crowding."²⁸ And as the State begins to allow the reopening of restaurants for in-person dining, it has required restaurants to "[a]djust maximum occupancy rules . . . to limit the number of people inside."²⁹

The newly issued guidance on in-person religious services follows the same approach. Attendance is limited "to 25% of building capacity or a

²⁷ *See, e.g.,* Centers for Disease Control & Prevention, *Interim Guidance on Large Events & Mass Gatherings* (March 15, 2020), <https://tinyurl.com/yx3l8kct>.

²⁸ California Department of Public Health, *Guidance on Retail Food, Beverage, and Other Related Service Venues* (March 16, 2020), <https://tinyurl.com/ycdltlhf>; California Department of Public Health, *Guidance for Pharmacies and Pharmacy Staff* (May 13, 2020), <https://tinyurl.com/y7vlmzgd>; *see also* Supp. Br. 2 (noting that California has established a cap on retail-store capacity).

²⁹ California Department of Public Health, *COVID-19 Industry Guidance: Dine-In Restaurants* 10 (May 12, 2020), <https://tinyurl.com/y7r7o75j>.

maximum of 100 attendees.” Guidance on In-Person Worship at 3. This approach is informed by the practical recognition that, “in gatherings of large numbers of people, it may be very hard to maintain physical distancing” and that “measures that depend on individual behavior . . . are difficult to sustain.” E.R. 127 (Declaration of James Watt, M.D., M.P.H.). It is also based on evidence that the risk of infection increases rapidly with group size: in a larger group, there is not only a greater chance that one or more people will be infected, but also a larger number of people present and potentially exposed to the virus. See Guidance on In-Person Worship at 3.³⁰ Numerous States have thus adopted limits on the size of gatherings.³¹ And the few courts that have struck down bans on in-person worship have done so precisely on the assumption that it is permissible to “cap the number of congregants coming

³⁰ If, for example, “there are 50,000 new cases in a state of 10 million, the per-person probability is 0.5 percent.” Weitz, et al., *Online COVID-19 Dashboard Calculates How Risky Reopenings and Gatherings Can Be*, Scientific American, May 21, 2020, <https://tinyurl.com/yd3sl5qx> (describing analysis by “interdisciplinary researchers from Georgia Tech, Stanford University, and the Applied Bioinformatics Laboratory”). Although that probability may “seem[] quite small,” “the probability that at least one individual is infected with COVID-19 goes up rapidly with group size.” *Id.* “In this example, there’s a 4.9 percent chance that one or more people in a dinner party for 10 would be infected, a 22 percent chance that one or more people in a restaurant with 50 would be infected, a 71 percent chance that that one or more people in a dance club for 250 would be infected, and over a 99 percent chance that one or more people in a concert or sports event for 1,000 would be infected.” *Id.* “In other words: small risks for individuals rapidly become large risks when viewed collectively.” *Id.*

³¹ See National Governors Association, *COVID-19 State and Territory Actions Tracker: Statewide Limits on Gatherings*, <https://tinyurl.com/ybwoo8l8> (last visited May 27, 2020).

together at one time.” *E.g., Roberts v. Neace*, 2020 WL 2316679, at *4 (6th Cir. May 9, 2020).

Plaintiffs nonetheless contend that California’s attendance cap is “arbitrary” because “there is no percentage limitation for manufacturing and warehousing facilities.” Supp. Br. 2. But these workplaces are not comparable to in-person religious services. Labor in manufacturing facilities, warehouses, and offices does not typically involve large numbers of people singing or reading aloud together in the same place, in close proximity to one another, for an extended duration. And the State prohibits workplace activities that resemble in-person religious services—for example, meetings of numerous workers in an “auditorium,” “large conference room,” or “meeting hall.” *California Stay Home Q&A: Are Gatherings Permitted?*, <https://tinyurl.com/y7w4nqs8> (last visited May 28, 2020). While the State’s new guidance lifted restrictions on in-person worship services and political protests to accommodate core First Amendment-protected activity, the general ban on large gatherings remains in place. *See id.; supra* at 11-12 & n.23.³²

³² According to plaintiffs, California’s governor stated on May 7, 2020 that manufacturing and other sectors slated for Stage Two reopening provide a greater “reward” than religious services. Appl. 5. That is inaccurate. The governor stated that “low risk” activities were favored for opening regardless of perceived “reward.” *See* Governor Gavin Newsom, Press Conference, Transcript (May 7, 2020), <https://tinyurl.com/y9vm9wbe/> (“we’re looking at the science, epidemiology looking again at frequency, duration, time and looking at low risk, high reward, low risk, low reward, looking at a series of conditions and criteria as well as best practices from other States and nations”). “As it relates to churches,” the governor continued, “[o]ur fear is simply this,

Manufacturing facilities, warehouses, and offices are also subject to a number of regulations that diminish the risk to public health when people go to work there. They are, for example, subject to occupational safety regulations and inspections; they must notify workers of how to report dangerous practices; and they must immediately notify authorities when on-site COVID contraction is suspected. *See* Cal. Labor Code § 6409.1(b) (reporting requirement); 8 Cal. Code Regs. § 340 (required notice to workers of right to report dangerous conditions and request inspection). They also know each employee’s identity, and often maintain records of which employees are present and when. *See* Cal. Labor Code § 226(a) (requiring wage statements to include employee’s name and partial social security number, and “total hours worked”). The State does not regulate religious services in the same way, for good reason. *Cf. Larson v. Valente*, 456 U.S. 228, 255 (1982) (“[S]tate inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids.”) (internal quotation marks omitted).³³

congregations of people mixing from far and wide, coming together proximate in an enclosed space at large scales, is a point of obvious concern and anxiety.” *Id.* Presaging the new guidance released this week, the governor also noted his sensitivity to “those that want to get back into church,” and his desire to “see what we can do to accommodate that.” *Id.*

³³ Another reason that “there is no percentage limitation for manufacturing and warehousing facilities,” Supp. Br. 2, and that there is a higher percentage limitation for “retail” operations, *id.*, is that ordinary occupancy limits for those establishments already ensure that crowd size will

2. Finally, there is no significant likelihood of the Court granting certiorari for plenary review following the Ninth Circuit’s resolution of the pending appeal. While conflicting authority could eventually develop in the lower courts on questions like those raised here, no conflict currently exists. No state or federal court has declared California’s past or current restrictions unconstitutional on free exercise grounds.³⁴ Across the country, trial courts have overwhelmingly rejected challenges to the various restrictions of other States.³⁵ And the courts of appeal have largely rejected requests for

be limited. With respect to manufacturing facilities, for example, the California Building Code bases the “design occupant load” (which is used to determine the number of required exits and similar rules for safe egress) on the premise that each occupant will have, on average, 100-150 square feet of space. 2019 Cal. Building Code, pt. 2, ch. 10, table 1004.5, <https://tinyurl.com/ybvtvbr9a> (addressing “concentrated business use” and “industrial” space); *see also id.* (60 square feet per occupant for mercantile use). By contrast, occupant-load allowances for places of assembly, such as auditoriums and churches, are premised on an expectation of far denser occupancy. *See id.* (seven square-feet per occupant for assembly areas without fixed seats); *id.* § 1004.6 (basing limits for assembly areas with fixed seats on the total number of seats). Thus, to achieve low-density occupancy in places where occupancy would otherwise be dense requires a significant deviation from preexisting limits.

³⁴ *See Abiding Place Ministries v. Wooten*, No. 3:20-cv-00683-BAS-AHG (S.D. Cal. Apr. 10, 2020); *Cross Culture Christian Ctr. v. Newsom*, 2020 WL 2121111 (E.D. Cal. May 5, 2020); *Gish v. Newsom*, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020), emergency motion for injunction pending appeal denied, No. 20-55445 (9th Cir. May 7, 2020) (Dkt. No. 21).

³⁵ *See, e.g., Antietam Battlefield KOA v. Hogan*, 2020 WL 2556496 (D. Md. May 20, 2020); *Spell v. Edwards*, 2020 WL 2509078 (M.D. La. May 15, 2020); *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Superior Ct. March 25, 2020).

injunctions pending appeals of those orders. *See Elim Romanian Pentecostal Church*, 2020 WL 2517093 at *1; *Tolle v. Northam*, No. 20-1419, Dkt. No. 14 (4th Cir. Apr. 28, 2020), pet. for cert. pending, No. 19-1283. Even the primary appellate authority relied upon by plaintiffs (App. 15; Supp. Br. 4-5), the Sixth Circuit’s decision in *Roberts v. Neace*, 2020 WL 2316679, at *5, recognized that it would be constitutional for a State to “cap the number of congregants,” as California’s new guidance does.³⁶

Indeed, California’s new guidance makes this case especially unfit for plenary review. Plaintiffs have failed to demonstrate any substantial, impending injury. *Supra* at 14-15. And the record, which was developed with respect to the State’s prior reopening policy, would provide a poor basis on which to judge the new guidance. If infections continue to decline, then California’s policies could be further loosened, *supra* at 7, 12, 17, making any determination by this Court here largely advisory. Plaintiffs argue that review is nevertheless warranted, because state policy could also move in the opposite direction if infection rates increase. Supp. Br. 3. But it would surely be premature to assess whether a hypothetical future pandemic response would be constitutionally justified without knowing the circumstances that prompted

³⁶ As plaintiffs acknowledge, the Fifth Circuit’s ruling in *First Pentecostal Church of Holly Springs v. City of Holly Springs*, 2020 WL 2616687, is “not entirely clear.” Supp. Br. 4. It does not explain whether that court’s grant of an injunction pending proceedings on remand was based on an assessment of the merits of constitutional or non-constitutional claims. *See* Mot. for Injunction. Pending Appeal, Case No. 20-60399, at 8-15 (May 16, 2020) (arguing that local restrictions violate a state statute and executive order).

its adoption. Issues of coronavirus precautions and the Free Exercise Clause may eventually require decision from this Court; this case does not.

CONCLUSION

The Court should deny the application for writ of injunction.

Respectfully submitted,

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May 28, 2020

ROBERTS, C. J., concurring

SUPREME COURT OF THE UNITED STATES

No. 19A1044

SOUTH BAY UNITED PENTECOSTAL CHURCH, ET AL.
v. GAVIN NEWSOM, GOVERNOR OF
CALIFORNIA, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[May 29, 2020]

The application for injunctive relief presented to JUSTICE KAGAN and by her referred to the Court is denied.

JUSTICE THOMAS, JUSTICE ALITO, JUSTICE GORSUCH, and JUSTICE KAVANAUGH would grant the application.

CHIEF JUSTICE ROBERTS, concurring in denial of application for injunctive relief.

The Governor of California’s Executive Order aims to limit the spread of COVID–19, a novel severe acute respiratory illness that has killed thousands of people in California and more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others. The Order places temporary numerical restrictions on public gatherings to address this extraordinary health emergency. State guidelines currently limit attendance at places of worship to 25% of building capacity or a maximum of 100 attendees.

Applicants seek to enjoin enforcement of the Order. “Such a request demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.” *Respect Maine PAC v. McKee*, 562 U. S. 996 (2010) (internal quotation marks omitted). This

ROBERTS, C. J., concurring

power is used where “the legal rights at issue are indisputably clear” and, even then, “sparingly and only in the most critical and exigent circumstances.” S. Shapiro, K. Geller, T. Bishop, E. Hartnett & D. Himmelfarb, *Supreme Court Practice* §17.4, p. 17-9 (11th ed. 2019) (internal quotation marks omitted) (collecting cases).

Although California’s guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts “[t]he safety and the health of the people” to the politically accountable officials of the States “to guard and protect.” *Jacobson v. Massachusetts*, 197 U. S. 11, 38 (1905). When those officials “undertake[] to act in areas fraught with medical and scientific uncertainties,” their latitude “must be especially broad.” *Marshall v. United States*, 414 U. S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an “unelected federal judiciary,” which lacks the background, competence, and expertise to assess public health and is not accountable to the people. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 545 (1985).

That is especially true where, as here, a party seeks

ROBERTS, C. J., concurring

emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground. The notion that it is “indisputably clear” that the Government’s limitations are unconstitutional seems quite improbable.

KAVANAUGH, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 19A1044

**SOUTH BAY UNITED PENTECOSTAL CHURCH, ET AL.
v. GAVIN NEWSOM, GOVERNOR OF
CALIFORNIA, ET AL.**

ON APPLICATION FOR INJUNCTIVE RELIEF

[May 29, 2020]

JUSTICE KAVANAUGH, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, dissenting from denial of application for injunctive relief.

I would grant the Church’s requested temporary injunction because California’s latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses. Such discrimination violates the First Amendment.

In response to the COVID–19 health crisis, California has now limited attendance at religious worship services to 25% of building capacity or 100 attendees, whichever is lower. The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries.

South Bay United Pentecostal Church has applied for temporary injunctive relief from California’s 25% occupancy cap on religious worship services. Importantly, the Church is willing to abide by the State’s rules that apply to comparable secular businesses, including the rules regarding social distancing and hygiene. But the Church objects to a 25% occupancy cap that is imposed on religious worship services but not imposed on those comparable secular businesses.

KAVANAUGH, J., dissenting

In my view, California’s discrimination against religious worship services contravenes the Constitution. As a general matter, the “government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits.” *McDaniel v. Paty*, 435 U. S. 618, 639 (1978) (Brennan, J., concurring in judgment). This Court has stated that discrimination against religion is “odious to our Constitution.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U. S. ___, ___ (2017) (slip op., at 15); see also, e.g., *Good News Club v. Milford Central School*, 533 U. S. 98 (2001); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520 (1993); *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993); *McDaniel*, 435 U. S. 618.

To justify its discriminatory treatment of religious worship services, California must show that its rules are “justified by a compelling governmental interest” and “narrowly tailored to advance that interest.” *Lukumi*, 508 U. S., at 531–532. California undoubtedly has a compelling interest in combating the spread of COVID–19 and protecting the health of its citizens. But “restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom.” *Roberts v. Neace*, 958 F. 3d 409, 414 (CA6 2020) (*per curiam*). What California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap.

California has not shown such a justification. The Church has agreed to abide by the State’s rules that apply to comparable secular businesses. That raises important questions: “Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?” *Ibid*.

KAVANAUGH, J., dissenting

The Church and its congregants simply want to be treated equally to comparable secular businesses. California already trusts its residents and any number of businesses to adhere to proper social distancing and hygiene practices. The State cannot “assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings.” *Ibid.*

California has ample options that would allow it to combat the spread of COVID-19 without discriminating against religion. The State could “insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities.” *Id.*, at 415. Or alternatively, the State could impose reasonable occupancy caps across the board. But absent a compelling justification (which the State has not offered), the State may not take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship.

The State also has substantial room to draw lines, especially in an emergency. But as relevant here, the Constitution imposes one key restriction on that line-drawing: The State may not discriminate against religion.

In sum, California’s 25% occupancy cap on religious worship services indisputably discriminates against religion, and such discrimination violates the First Amendment. See *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U. S. 1312 (1986) (Scalia, J., in chambers). The Church would suffer irreparable harm from not being able to hold services on Pentecost Sunday in a way that comparable secular businesses and persons can conduct their activities. I would therefore grant the Church’s request for a temporary injunction. I respectfully dissent.